EUCO INTERNATIONAL SDN. BHD.

v.

P.F. CHEN

FEDERAL COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 181 OF 1982]
13 APRIL 1984

***COMPANY LAW**: Director's right to be indemnified - Guarantee given by director - Whether entitled - Assurance by director - Whether binding on company - Resolution by directors - Whether appellant intended to indemnify.*

***CONTRACT**: Guarantee - Execution of guarantee by company director - Right of director to indemnify.*

The appellant company appealed against a declaration made by the trial Judge that the respondent was entitled to be fully indemnified in respect of a guarantee for overdraft facilities. The respondent was a director of the 2nd defendant company, which was a subsidiary of the appellant company. He was, however, not a shareholder of either company. On 25 January 1967, he joined the 4th, 5th and 6th defendants in giving a guarantee (P1) to the Malayan Banking Ltd. for granting overdraft facilities up to RM300,000 to the 2nd defendant company. Subsequently, the 2nd defendant company failed to pay the bank and the bank obtained judgment against the guarantors. The respondent paid RM250,000 to the bank and claimed against the defendants to be fully indemnified for this sum. He relied on an oral assurance from director of the appellant company and also a documentary evidence in the form of a resolution signed by the 3rd, 4th and 5th defendants on 23 July 1964 as directors of the appellant company and in pursuance of the articles of association of that company.

Held:

[1] There was sufficient evidence to conclude that the appellant company had agreed to indemnify the respondent. The resolution of 23 July 1964 was intended to be an indemnity given to the guarantors to sign the guarantee. Though the resolution was passed prior to the date of the guarantee the resolution was not confined to guarantees prior to its date. The word "furnished" in the resolution could apply to the past and the future. Where there is ambiguity the Court can ascertain the intention, which prevails over the words used. The intention of the parties was clear from the resolution and the oral assurance.

[2] The resolution was not to be taken as a personal indemnity from the directors. It was clear beyond doubt that the resolution though a circular one, did represent a meeting of minds, which is the essence of a meeting and the passing of a resolution.

[Appeal dismissed with costs.]

Cases referred to:

Hely-Hutchinson v. Brayhead Ltd. & Anor. [1967] 3 All ER 98

Freeman & Lockyer (a firm) v. Buckhurst Park Properties (Mangal) Ltd. & Anor. [1964] 1 All ER 630

Other sources referred to:
Sourcebook of Singapore and Malaysian Company Law, Philip Pillai, p. 402 para. 4
Odgers on Contruction of Deeds & Statutes, 5th Edn. p. 31

For the appellant - G. S. Nijar; M/s. Abdul Aziz Ong & Co.
For the respondent - Raja Aziz Addruse; M/s. Rithauddeen & Aziz

JUDGMENT

Lee Hun Hoe CJ (Borneo):

The appellant/1st defendant appealed against a declaration made by the learned Judge on 23 June 1982 that the respondent/plaintiff is entitled to be fully indemnified in respect of a guarantee for overdraft facilities. Out of four grounds of appeal one was abandoned. The first ground is that the learned Judge was wrong to conclude that there was sufficient evidence from which he could draw inference that the appellant had agreed to indemnify the respondent on the guarantee either orally or in writing. The second ground is that the learned Judge was wrong to hold that an assurance from a director of the company, without more, when acted upon, could bind the company. Lastly, that the learned Judge drew wrong conclusion in that a document (P2) was intended by the appellant to indemnify the respondent in respect of the guarantee issued by him.

We would only summarise the salient facts. The respondent is a consultant engineer. He was an employee of Euco Development Sdn. Bhd. (2nd defendant) which is a subsidiary of Euco International Sdn. Bhd. (appellant). The 3rd, 4th, 5th and 6th defendants are brothers. They own shares in and are directors of the appellant which holds 570,200 shares out of 842,725 in the 2nd defendant company. The balance of 221,525 shares are held by Lee Wah Nominees. The plaintiff was appointed director of the 2nd defendant company. He was not a shareholder of either the appellant or the 2nd defendant company. He is also the director of Euco Prefab Sdn. Bhd. and Euco Engineering Sdn. Bhd. which are associated and connected with the 2nd defendant company. They are also the subsidiaries of the appellant.

As director, the respondent was expected, from time to time, to join other directors to guarantee debts or other liabilities of one or more of the companies by issuing letters of guarantee. On 25 January 1967 he joined the 4th, 5th and 6th defendants in giving a guarantee (P1) to the Malayan Banking Ltd. for granting overdraft facilities up to RM300,000 to the 2nd defendant company. Subsequently, the 2nd defendant company failed to pay the bank on the overdraft facilities for which the guarantee (P1) was issued. The bank obtained judgment against the respondent, the 4th and 6th defendants on 7 January 1975 in Kuala Lumpur High Court Civil Suit No. 608 of 1971. The respondent has so far paid RM250,000 to the bank. Hence he claimed against the defendants to be fully indemnified against all sums paid by him to the bank. He relied on the oral assurance and also on the documentary evidence in the form of P2 which was signed by the four brothers in the following terms:-

EUCO INTERNATIONAL LIMITED

> We, the undersigned, the Directors of Euco International Limited for the time being pursuant to Art. 91 of the Articles of Association, hereby make the following
>
> RESOLUTION: INDEMNITY TO GUARANTORS OF SUBSIDIARY COMPANIES FOR OVERDRAFT AND OR LETTERS OF CREDIT FACILITIES:

Resolved that In consideration of Letters of Guarantee furnished by Messers. John Eu. Roy Eu, and P.F. Chen to the bankers of our Subsidiary Companies for overdraft and or letters of credit facilities, we hereby agree jointly to hold ourselves responsible for such Letters of Guarantee and to indemnify the Guarantors for any out of pocket expenses including the sum guaranteed with interest thereon if they are called upon by the Bankers to make good such facilities.

Dated this 23 July 1964

...

...

Article 91 reads:-

Resolution signed by as Directors to be valid	91. A resolution in writing signed by all by the Directors shall be effective for all purposes as a resolution passed at a meeting of the Directors duly convened, held and constituted. In case any Director is absent From the Federation of Malaya, a resolution signed by all the other Directors shall be valid and effectual.

In support of their contention the appellant cited *Hely-Hutchinson v. Brayhead Ltd. & Anor.* [1967] 3 All ER 98 @ 102 and *Freeman and Lockyer (a firm) v. Buckhurst Park Properties (Mangal) Ltd. & Anor.* [1964] 1 All ER 630. Reference was also made to *"Sourcebook of Singapore and Malaysian Company Law"* by Philip Pillai at p. 402, para 4 which states:

> It should be noted that a single director, unless appointed or held out as a committee of the board or as a managing director or expressly or impliedly authorised to act in the matter, is not capable of imposing liability on the company...

Although the learned Judge discussed about the oral assurance and understanding he referred to another cogent ground which was relied by the respondent, that is, the documentary evidence (P2). Here we have a resolution made by four persons in their capacity as shareholders and directors of the appellant. Another point taken is that the guarantee (P1) was signed on 25 January 1967, about three years after the resolution which was made on 23 July 1964. We do not think this is really material on the evidence. Each case must be decided on its own particular facts. We agree with the respondent that the facts in our case are quite different from the facts in the cases cited earlier. Much was made of the word "furnished" in (P2) by the 1st defendant. It was argued that (P2) is meant to indemnify guarantees issued prior to 23 July 1964. In his evidence 4th defendant mentioned that there were so many guarantees to sign. Every time a guarantee was signed it was backed up with a resolution which contained an indemnity by the company to the individual directors who signed the guarantee. For example, at p. 105 of the Appeal Record the word "furnished" was also used in (D19), an indemnity given by the 2nd defendant company. The word "furnished" could apply to the past or the future. It need not necessarily refer to guarantees already issued. The oral assurance given by the directors has also to be considered. It is the submission of the appellant that this is a matter of construction. It may be useful to refer to (D19) which was dated 22 April 1966. This resolution was intended to be an indemnity given to the guarantors to sign (P1). The word "furnished" was also used but the guarantee (P1) was not given until 25 January 1967.

Where there is ambiguity the Court can ascertain the intention. *Odgers on Construction of Deeds and Statutes 5th Edn.* at p. 31 reads:

Rule II. The intention may prevail over the words used.

> Ordinarily, parties use apt words to express their intention: but often they do not. The cardinal rule again is that clear and unambiguous words prevail over any intention, but if the words used are not clear and unambiguous, the intention will prevail. We have seen that the most essential thing is to collect the intention of the parties from the expressions they have used in the deed itself. What if the intention so collected will not square with the words used? The answer is that the intention prevails.

The submission of the appellant is that (P2) does not confine to guarantees prior to the date of resolution. The facts speak for themselves.

(P2) is a resolution made pursuant to Art. 91 of the articles of association of the appellant. The intention is clear. As the learned Judge correctly pointed out at p. 112 of the Appeal Record that "it is common ground that the resolution is not to be taken as a personal indemnity from the directors. I agree with Counsel that this is the correct view to take - a circular resolution passed under the provisions of the articles of association of a company in the form that it takes in (P2) cannot be said to be a personal indemnity from the directors as they cannot indemnify themselves. In this case (P2) has to have effect as an indemnity from the first defendant company." They may not meet formally in signing (P2). But it is clear beyond doubt that (P2) did represent a meeting of minds which is, after all, the essence of a meeting and the passing of a resolution.

The learned Judge has dealt with the matter very carefully, in particular, the evidence of John Eu (4th defendant). He was satisfied that there was no reason for (P2) to be qualified by the words "prior to the date of (P2)". We agree with the learned Judge that the real reason for making (P2) as given by the 4th defendant was to make Richard Eu (3rd defendant) bear his part of the liabilities as he was not a shareholder or director in the subsidiary companies.

For reasons given, we would dismiss the appeal with costs. Deposit to the respondent on account of taxed costs.

Also found at [1984] 1 CLJ 340